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In the

UNITED STATES SUPREME COURT

OCTOBER TERM, 1940

H. C. JORDAN AND ROSS WALKER, *Petitioners*

VERSUS

G. V. FISHER, FRANCES AMBROSE LAW AND HUSBAND, HAROLD WARD LAW, AND HONOLULU OIL CORPORATION, *Respondents*

AND

H. C. JORDAN AND ROSS WALKER, *Petitioners*

VERSUS

G. V. FISHER AND HONOLULU OIL CORPORATION, *Respondents*

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Fifth Circuit

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SUBJECT MATTER INDEX

	Page
PRELIMINARY STATEMENT	2-3
BRIEF STATEMENT OF CASE	3
BASIS OF SUPREME COURT'S JURISDICTION— As to the 120 acres involved in the suit	4-10
AFFIDAVIT for citation by publication to issue against Jordan in Head vs. Jordan suit in the County Court of Scurry County, Texas, November 14, 1912	4
ARTICLE 2039: The statutory grounds for notice to be published	5
ARTICLE 2050: No judgment without service, foot-note	7
QUESTIONS PRESENTED: Relating to the 120 acres	9-10
BASIS OF SUPREME COURT'S JURISDICTION: As to the 200 acres involved in the suit	10-17
ARTICLE 4638: Court cannot divest title in divorce judgment, foot-note	11
ARTICLE 1977: In suits against non-resident for land, title must be especially pleaded, foot-note	12

INDEX—(Continued)

Page

ARTICLE 5510: Memorandum of a title must be recorded ten years in county where land is located, foot-note 15

QUESTIONS PRESENTED: Relating to the divorce judgment affecting the title to the 200 acres 16-17

QUESTIONS PRESENTED: Relating to the 1928 judgment affecting the title to the 200 acres 14-15

REASONS FOR ALLOWANCE OF WRIT OF OF CERTIORARI—On the judgment of the Circuit Court relating to the 120 acres..... 18-26

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI—On the judgment of the Circuit Court relating to the 200 acres by reason of the divorce judgment of 1916..... 22-24

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI—On the judgment of the Circuit Court relating to the 200 acres by reason of the 1928 judgment..... 16-27

CERTIFICATE 28

SUPPORTING BRIEF 29-52

PROPOSITION I

(As to the 120 acres — The Scurry County Court judgment against Jordan a nullity).... 29

STATEMENT 30

INDEX—(Continued)

	Page
AUTHORITIES	30-34
PROPOSITION II (As to the 120 acres — The attachment of Jordan's lands did not give court jurisdiction to sell without serving him with notice required by statute	34
ARGUMENT AND AUTHORITIES	25
PROPOSITION I (Relating to the 200 acres—The 1917 divorce judgment divesting title was void)	35-36
STATEMENT	36
ARGUMENT AND AUTHORITIES	36-45
PROPOSITION II (Relating to the 200 acres—The 1928 judgment inhibited under the facts alleged in the petition for it that memorandum of title not recorded for ten years)	45
STATEMENT	45-47
ARGUMENT AND AUTHORITIES	47-48
PROPOSITION III (Relating to the 200 acres—The 1928 judgment void because it was for cancellation of the divorce judgment which was void)	48
STATEMENT	48

INDEX—(Continued)

Page

ARGUMENT AND AUTHORITIES 49

PROPOSITION IV

(Relating to the 200 acres—The 1928 judgment void because the petition alleged facts that Ethel Hall and H. C. Jordan owned the land as co-tenants, which she affirmatively alleged and was not repudiated by her, so that no adverse possession could exist in law) 50

STATEMENT 50

ARGUMENT AND AUTHORITIES 50-52

CONCLUSION 52

WAIVER OF SERVICE 53-54

LIST OF AUTHORITIES

	Page
Article 2039 R. S. of Texas (see page 5 of petition)	33
Article 2050 R. S. of Texas	20-35
Article 4638 R. S. of Texas	36
Article 5510 R. S. of Texas (see foot-note page 15 of petition)	47
American Surety Company vs. S. L. & S. Co., 180 S. W. 101, Sup.	34
Askew vs. Rountee, 120 S. W. (2) 117	43
Aucott vs. Aucott	37
Bank vs. Chicago T. & T. Co., 49 L. Ed. 1051	33
Baker vs. Fogle, 217 S. W. 141	48
Barker vs. Temple Lumber Co., 12 S. W. (2) 175	47
Borden vs. City of Houston, 62 S. W. 426	31
Cleveland vs. Ward, 285 S. W. 1063	33
Commander vs. Bryan, 123 S. W. (2) 1008	43
Dunn vs. Taylor, 94 S. W. 347	31, 34
Earl vs. McVeigh, 23 L. Ed. 398	35, 49
Fergara vs. Meyers, 239 S. W. 544	48
Galpin vs. Page, 21 L. Ed. 959	33, 34
Graham vs. East Texas Land & Imp. Co., 50 S. W. 579	49

AUTHORITIES—(Continued)

	Page
Grant vs. Ellis, 50 S. W. (2) 1093	39
Hardin vs. Hardin, 217 S. W. 1108	51
Harding vs. Standard Oil Company, 182 Fed. 421	33
Harris vs. Barngrover, 72 S. W. (2) 971	42
Hayworth vs. Williams, 116 S. W. 43	51
Henry vs. Beauchamp, 39 S. W. (2) 642	51
Hudson vs. Nowell & Son, 8 S. W. (2) 778	49
Johnson vs. Hunter, 147 Federal 133	33, 34
Krumenacker vs. Audis, 38 N. D. 500 (165 N. W. 524)	32
McCamant vs. McCamant, 187 S. W. 1096	48
Milner vs. Gatlin, 261 S. W. 1003	33
Neal vs. Pickett, 280 S. W. 748	49
Parker vs. Scobee, 36 S. W. (2) 303	31, 32
Perkins vs. Perkins, 166 S. W. 915	51
Reasoner vs. Reasoner, 59 S. W. (2) 887	37, 39
Ritch vs. Jarvis, 64 S. W. (2) 831	48
Scott vs. Bank, 133 Texas 1 (123 S. W. 2nd 306)	37
Stewart vs. Anderson, 8 S. W. 295	33, 34
Smith vs. Paschal, 1 S. W. (2) 1086	41

AUTHORITIES—(Continued)

Page

Stegal vs. Huff, 54 Texas 193 .....31, 33, 34

Stoneman vs. Bilby, 96 S. W. 50 ..... 31, 34

Temple Lumber Co. vs. Pulliam, 285 S. W. 609.... 48

Tiemann vs. Tiemann, 34 Texas 522 37

Thompson vs. Whitman, 18 Wall 457, 21 L. Ed. 897 44

Watkins vs. Watkins, 119 S. W. 145 51

Wilkerson vs. Owen, 72 S. W. (2) 330 49

Young vs. Young, 127 S. W. 898 31

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PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Fifth Circuit

To the Honorable, the Chief Justice and the Associate Justices of Supreme Court of the United States:

H. C. Jordan and Ross Walker, resident citizens of the State of Texas, respectfully present this their Petition for Writ of Certiorari to the Circuit Court of Ap-

peals of the United States for the Fifth Circuit to review a final judgment of said Circuit Court entered on December 18, 1940, where it reversed a judgment of the District Court of the United States for the Northern District of Texas, Lubbock Division, and represent:

PRELIMINARY STATEMENT

The Record accompanying this application covers two suits consolidated into one between the same parties to establish title to two adjoining tracts of land in Yoakum County, Texas, begun by Respondents in the District Court of the United States for the Northern District of Texas, Lubbock Division, against Petitioners, one suit No. 63 Civil Action for 120 acres, (R. 3-9) and the other No. 64 Civil Action for 200 acres, (R. 43-49. Jurisdiction of the District Court in each case was based on diversity of citizenship, the Respondent Plaintiffs being citizens of California, and Petitioners being citizens of the State of Texas, the value of each tract of land in excess of $3,000.00, and each tract situated within such District and Division of said Court, (Id.). The District Court consolidated and tried them together but entered a separate judgment in each case and rendered one opinion covering both cases, (R. 19). Only one Record on appeal was made, same covered both cases under one cover, and the Circuit Court of Appeals, by its order, consolidated and heard them as one case and rendered one opinion covering said consolidated cases.

Petitioners claimed title to an undivided one half interest in each tract, filed answer and cross action so asserting, and judgment was rendered for them after a hearing and trial with jury waived for an undivided one half interest in each tract and for Respondents for the other undivided one half interest, (R. 39; 63). The Court filed Findings of Fact and Conclusions of Law, (R. 35; 58), rendered an opinion, (R. 19) and Respondents appealed, (R. 41-42; 63). On appeal the cases were reversed by the United States Circuit Court of Appeals for the Fifth Circuit on December 18, 1940 on written opinion, holding superior title in Respondents against Petitioners for the whole of each tract of land, (R. 324-332). Said decision practically disposes of the case in favor of Respondents. Petitioners, therefore, present this Petition for Writ of Certiorari.

BRIEF STATEMENT OF THE CASE

Petitioner H. C. Jordan acquired Section 800 of 640 acres from the State in 1908, (R. 68). It was community property of him and his wife, Ethel Hall Jordan, (R. 69). The two tracts in suit is the East Half of the Section; the 200 acres was their homestead, (R. 146; 148). They separated about October 7, 1912, Jordan leaving the State at once and going to California and and remaining there until 1921. He enlisted in the Army in 1917 for the World War as a resident citizen of the State of California, (R. 244-245).

BASIS OF SUPREME COURT'S DECISION

The 120-acres—The Attachment Judgment:

On November 14, 1912, after Jordan had left the State, one W. E. Head sued him in the County Court of Scurry County, Texas, on a debt of $337.50 and attached the 440 acres of Section 800 (all of it except the 200 acre homestead). Service of citation was by publication, (R. 36).

Default judgment was rendered for the debt on July 10, 1913, and the 440 acres (the 120 acres a part) was ordered sold at Sheriff's sale. It was sold to R. H. Looney on November 4, 1913, who satisfied the judgment and costs for the land, (R. 76-77).

By mesne conveyance Looney conveyed the 440 acres to William Hall, father of Jordan's wife, (R. 83-94). Later said Hall and his Estate conveyed the 120 acres to Ethel Hall, the then divorced wife of Jordan, (R. 109-111). (She was divorced from Petitioner Jordan on September 19, 1916, R. 148). Ethel Hall thereafter conveyed the 120 acres to Respondent, G. V. Fisher, who then executed an oil and gas lease to Honolulu Oil Corporation and by mesne conveyances conveyed an undivided one-half interest to Frances Ambrose Law and husband, Co-Respondents herein, (R. 118; 131-143).

Service in the case was by citation by publication based on this affidavit of Head's attorney:

> "That he has made diligent inquiry concerning the whereabouts of the defendant, H. C. Jordan, in

> the cause of W. E. Head vs. H. C. Jordan, No. 513, in the County Court of Scurry County, Texas, and that the whereabouts of said defendant by the use of reasonable diligence cannot be ascertained; that said affiant is one of the attorneys for the plaintiff in said cause, and asks for citation by publication."

Article 2039 authorized a citation by publication:

> "where a party * * * shall make oath * * * that any party defendant therein is a non-resident of the state, or that he is absent from the state, or that his residence is unknown to affiant, the clerk shall issue citation for such defendant * * *".

Respondents alleged that the judgment and sale was valid and divested title out of Jordan to the 120 acres, (R. 67). Petitioners answered, denying the validity of the judgment and sale and by cross action claimed Jordan's undivided one-half interest, as co-tenants with his divorced wife and her assigns, (Respondents) alleging that the citation by publication was not legally authorized by Statute so that the County Court never acquired jurisdiction to render the judgment and sell the lands, (R. 10-12); also that the court had no jurisdiction to sell the lands without first acquiring jurisdiction over him to adjudicate the judgment and sale, it being a prerequisite for the court to acquire jurisdiction over Jordan by serving him in the mode prescribed by Statute, (Id.) Respondents replied they were innocent purchasers for value without notice and Petitioners answered that the record in the cause

showed the infirmity of the judgment and the sale; that Respondents were required by law to inquire if the Court had jurisdiction to render the judgment against Jordan and next to inquire if it had jurisdiction to sell the lands, (Id.)

The District Court sustained Petitioner's contentions holding that under the Statutes of Texas and the decisions thereunder by our Supreme Court, the citation by publication against Jordan was issued on a ground not authorized by law, nor meeting the requirements of the Statute, and was a nullity; finding that the affidavit for the citation was the only one filed and that the citation published was based thereon, (R. 30). The applicable Statute and the decisions so holding were cited in the opinion, (R. 19-30). The court also found that the record in the County Court case disclosed the infirmity of the proceedings for the court's jurisdiction to attach to adjudicate and held, by reason of the nullity of the judgment and sale, that an inquiry would thus disclose the invalidity of the proceedings, that the County Court never acquired jurisdiction to adjudicate against Jordan and his property, also Respondents could not claim Jordan's one-half interest in the land as innocent purchasers for value without notice under the established law in Texas, (R. 38; 19-30).

On appeal the Circuit Court of Appeals reversed the holdings of the District Court holding:

(1) That under the facts stated, the County Court judgment was merely voidable, not void, and so could not be collaterally attacked.

(2) That the sale of the land in question was valid as against a collateral attack, (R. 324-329).

The court cited no Texas Statute nor Texas decision to sustain its holding, (Id.). It based its holding on the ground that the use of the word "whereabouts", under a liberal construction of Article 2039 quoted, was the equivalent of "residence" and also on the ground that the clerk inserted in the citation that Jordan's residence was unknown and the judge recited in the judgment that he was "duly cited" and the Circuit Court said: "It thus appears that the clerk thought and the judge decided that 'whereabouts' was the equivalent of 'residence', (R. 327).

The Court admitted that a Texas Court of Civil Appeals (Young vs. Young, 127 S. W. 898) had directly held that in a service by publication "whereabouts" is not the equivalent of "residence".

The Circuit Court of Appeals admitted that the Supreme Court of Texas directly holds that a sale of attached lands without a valid service in the mode prescribed by law on the defendant is a nullity, for the reason the Statutory requirement is jurisdictional.[1]

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1. "Article 2050. No judgment without service. In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon an appearance by the defendant, as prescribed in this chapter, except where otherwise expressly provided by law."

(Stewart vs. Anderson, 8 S. W. 295; American Surety Company vs. S. L & S. Co., 180 S. W. 101, Sup.)

In other words, it is the Statute of Texas, as construed by the Supreme Court, that jurisdiction of a court to sell attached lands is denied until a judgment has been entered against the defendant, based on a valid citation issued and published as required by Statute.

It is, therefore, believed by the Petitioners that the judgment and opinion of the Circuit Court is in conflict with the Statutes of Texas and with the decisions of the Texas Courts, Supreme and Courts of Civil Appeal, on the validity of the County Court judgment attacked, as well as the sale of the attached lands to satisfy it, and that it is without support of any Texas Statute or decision of the Texas Court; that the laws of Texas and the decisions applicable should rule the case at bar and were not applicable by the Circuit Court in its decision.

The case before the Court presented a controversy of title to land situate in Texas wherein a County Court judgment and sale by a Texas Court was attacked. Therefore, the Supreme Court has jurisdiction to review the Circuit Court's judgment reversing that of the District Court and this under Section 347 U.S.C.A. and rule 38 of the Supreme Court.

Also the Circuit Court's opinion and decision in this case is in conflict with the case of Johnson vs. Hunter,

147 Federal 133 by the 8th Circuit Court of Appeals on the same matter or question. In said case a State Court of Arkansas had rendered a judgment against Johnson subjecting his land to levee liens on a judgment against him based on a citation by publication, alleging that he was a non-resident but did not allege that he was not in the County at the time of the suit or that there was no one on the land occupying it at said time. The Statute in question authorized service by publication upon non-residents of the state and further "provided further, actual service of summons shall be had where the defendant is in the county or where there is an occupant of the land." Johnson was a resident of Ohio at the time of the suit and judgment and sale of his land. By reason of the defects or omission in the affidavit or the citation, the Circuit Court of Appeals held that the State judgment was a nullity under the Arkansas Statutes and the decisions of the Arkansas courts and that the defect in said citation was jurisdictional so that the judgment and the sale was void and not merely voidable.

Petitioners therefore present these questions that are material, which will determine the rights of the parties hereto:

1. Under the allegations in the Head affidavit quoted, was the County Clerk of Scurry County, Texas, authorized, under Article 2039, to issue and have published the citation against Jordan, a non-resident?

2. Under the facts stated, ~~was~~ did the issuance of the citation by the clerk, with the recitations in the citation that Jordan's residence was unknown, and the publication thereof, constitute legal notice to him to appear and defend the Head suit?

3. Under the facts stated, assuming that the citation for publication issued by the clerk was not authorized by Article 2039 and that the citation published against Jordan did not constitute legal notice served upon him to defend the suit, was the County Court of Scurry County, Texas, authorized to sell Jordan's lands and divest title thereto to satisfy the debt demand of W. E. Head—it being conceded by the Circuit Court of Appeals in this case that the Supreme Court of Texas holds that a sale of attached lands is a nullity if the defendant owner has not been served with legal notice in the mode prescribed by Texas Statutes, (Stewart vs. Anderson, 8 S. W. 295; American Surety Company vs. S. L. & L. Co., 180 S. W. 101)?

BASIS OF THE SUPREME COURT'S JURISDICTION AS TO THE 200 ACRES.

The 200 acres was the community property and the homestead of Jordan and his wife prior to September 19, 1916, when the wife divorced Petitioner Jordan. She began a suit against him in the District Court of Scurry County, Texas, on December 31, 1915, in said Court, alleging his residence was not known and prayed for citation by publication against him;

alleging in her petition that his abandonment was a ground for divorce and she also asked her maiden name to be restored and her children's name changed to her maiden name, (R. 183). She also alleged that the 200 acres in question, with a vacant lot in Plains, Texas, was their community property but because of his abandonment of her title should be divested out of him thereto and vested in her, (Id.). She had default judgment against him thereafter on September 19, 1916, for divorce, change of name and a judgment divesting the title to the land in her. No attorney was appointed to represent Jordan in said suit and no appearance or waiver was made by him, (R. 148). No statement of the evidence introduced, if any, to support the judgment was caused to be transcribed and filed in the cause, (R. 329; 175)

The judgment so entered was recorded on March 5, 1920, in Volume 12, page 203 of the Deed Records of Yoakum County, Texas, where the land was situated, (R. 148). The pleadings in said cause, nor the judgment, as respects the lands, was not for a partition or division thereof between the parties but was to divest title out of Jordan and vest it in the wife, which the judgment purported to do, (R. 148; 183) contrary to Article 4638.[1]

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1. "Article 4638. Division of Property. The court pronouncing a decree of divorce shall also decree and order a division of the estate of the parties in such a way as the court shall deem just and right, having due regard to the rights of each party and their children, if any. Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate."

Thereafter, on November 19, 1927, the divorced wife, Ethel Hall, filed a Trespass to Try Title suit against Jordan in the District Court of Yoakum County, Texas, alleging his residence unknown and for him to be cited by publication, (R. 191; 193) and thereafter had another default judgment against him on June 5th, 1928, (R. 146). The judgment simply recites that title is divested out of Jordan and vested in Ethel Hall. She then conveyed the 200 acres to G. V. Fisher, in satisfaction of a mortgage, on February 26, 1931, (R. 153-155). Fisher then executed an oil and gas lease to the Honolulu Oil Corporation, (R. 159-165).

In the First Count of her petition in said suit she alleged she owned the 200 acres and that Jordan dispossessed her. She stated no fact showing her title superior to Jordan's, (R. 191). Article 1977[2] of the Statute required, for a cause of action, the plaintiff to allege her title and facts to show it was superior to Jordan's title.

The Second Count of her petition was to establish title by the Statute of Limitation for 10 years with her memorandum of title recorded for such period, (R. 192). She alleged her memorandum of title was the divorce judgment which was recorded on March 5,

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2. "Article 1977. Requisites of pleadings. The pleadings in such case shall set forth the title of the complainant, and such proceedings shall be had in such action as may be necessary to fully settle and determine the question of right or title in and to said property between the parties to said suit, and to decree the title or right of the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment or order into effect."

1920, and she based her right to recover by reason of the aforesaid judgment, (Id.). She alleged adverse possession by reason of such divorce judgment, (Id.).

As aforesaid, as respects this 200 acres, Respondents sued Petitioners in the District Court of the United States for the Northern District of Texas, Lubbock Division, on October 27, 1939, and alleged that the divorce judgment of September 19, 1916 divested title out of Jordan and vested it in his wife, Ethel Hall, (R. 46). Also, they alleged the 1928 judgment of June 5, 1928, in favor of Ethel Hall against said Jordan in the District Court of Yoakum County, Texas, divested title out of him and vested it in said Ethel Hall, (R. 46-47). Petitioners answered denying the validity of the judgments and by cross-action alleged the nullity of said judgments, that Jordan owned in community with his wife a one-half interest in the 200 acres until she divorced him on September 19, 1916, and that since that time he has owned an undivided one-half interest as a co-tenant with Ethel Hall and her assigns, Respondents herein, (R. 50-55). It was alleged that the divorce judgment divesting title was a nullity for the reason the jurisdiction of the court to do so was denied by Article 4638, (Id.). As to the 1928 judgment they alleged its nullity for the reason no cause of action or subject matter was presented to the court for it to exercise jurisdiction to decree as to the first count and as to the second count that Article 5510 forbid a cause of action to establish a 10 year Limitation Title with-

out such title being of record in the Deed Records of Yoakum County, Texas, where the land was situate, for ten or more years. Further that such claim of title asserted in said judgment by Ethel Hall was based on the 1916 divorce judgment, which was a nullity, and that the court had no jurisdiction to confirm a void judgment which was the purpose of the second count of her petition, (Id.).

On a hearing after trial of this case the District Court entered judgment for Petitioners for a one-half interest in the 200 acres, holding the two aforesaid judgments were void and, being void, that Respondents could not claim Jordan's one-half interest in said land as innocent purchasers for value and without notice, (R. 31-35). The court filed Findings of Fact and Conclusions of Law, (R. 31-38) as sustaining his decision and judgment.

On Respondents' appeal the Circuit Court of Appeals reversed the holdings of the District Court and held that the divorce judgment divesting Jordan of the land was valid against a collateral attack; further holding in this connection that Article 4638 was not a limitation on the jurisdiction of the District Court of Scurry County in the divorce judgment but that said article "was intended to guide the court by prescribing a rule of decision", (R. 330).

As to the 1928 judgment it held that it was not void but merely voidable and not susceptible to a collateral attack on the theory that two separate tracts of land

constituted the 200 acres and neither of such tracts exceeded 160 acres, so that Article 5510 did not forbid judgment establishing a 10 Year Limitation Title, where the memorandum of title as the basis therefor was not duly registered in the Deed Records of Yoakum County, Texas, where the land was situate.

It was the contention of Petitioners that Article 4638 denied jurisdiction of the District Court to divest Jordan's title to the 200 acres and that Article 5510[1] forbid a cause of action for a court to adjudicate when the cause of action pleaded stated facts showing that no cause of action for a limitation title could exist under Article 5510 as construed by the Supreme Court of Texas (Baker vs. Temple Lumber Co., 12 S. W. (2) 175; Temple Lumber Co. vs. Pulliam, 285 S. W. 609; Vergara vs. March, 239 S. W. 544; Baker vs. Fogle, 217 S. W. 141; and McCament vs. McCament, 187 S. W. 1096).

It was also contended that the limitation title pleaded was the divorce judgment, which was void, and that her said suit was for the purpose of having the court con-

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1. "Article 5510. Ten years' possession. Any person who has the right of action for the recovery of lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward. The peaceable and adverse possession contemplated in this article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be coextensive with the boundaries specified in such instrument."

firm the validity of said divorce judgment which was void, so that the court had no jurisdiction of a cause of action to confirm a void judgment. It was further contended that the divorce judgment could have no effect other than to decree to Ethel Hall the use of the 200 acres as against Jordan for a term of years, or for life, so that there could be no cause of action by the wife against him for title based on adverse possession without a repudiation of the divorce judgment on her part, (R. 52-55).

Petitioners therefore present these questions respecting the two judgments against Jordan affecting the 200 acres:

1. The divorce judgment: Did the terms and provisions of Article 4638, as applied to the record facts in the divorce judgment as herein related, prescribe a limitation on the jurisdiction of the court to divest title out of Jordan rather than a "Rule of Decision"?

2. In the determination of the validity of the divorce judgment under the facts stated, should the Circuit Court of Appeals have adopted and applied the provisions of Article 4638 as construed by the Supreme Court of Texas and the Courts of Civil Appeals of the State?

3. The 1928 judgment: Under the facts stated, that is Ethel Hall's allegations to establish in her a 10 year limitation title out of Jordan under Article 5510, and which allegations and references therein

showed her alleged memorandum of title recorded in the Deed Records of Yoakum County, Texas, for about seven and one-half years and not duly registered for ten years, did said cause of action thus presented to the court present a cause of action inhibiting recovery upon the facts she alleged?

4. Under the facts stated, assuming that the divorce judgment of 1916 did not have effect to divest Jordan of title to his interest in the 200 acres, did the allegations for a 10 year limitation title out of Jordan present a subject matter or cause of action for the court's determination, it appearing from her allegations that she affirmed the 1916 judgment and did not repudiate it?

5. Under the facts stated and in particular the allegations in Ethel Hall's petition for a title to be vested in her and divested out of Jordan by reason of her divorce judgment against him, assuming that the divorce judgment did not have effect to divest title out of Jordan and vest it in the wife, did the cause of action so presented to the District Court of Yoakum County, Texas, present a case for the court to confirm as valid the divorce judgment?

All the foregoing questions were duly presented by Petitioners to the trial court and also in their briefs in the Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The attachment judgment: The Honorable Circuit Court of Appeals for the 5th Circuit, in reversing the judgment below and in holding that the judgment attacked was not void, that the County Court of Scurry County, Texas, acquired jurisdiction to render it, wholly disregarded Articles 2039 and 2050 of the Texas Statutes and the applicable Texas decisions of Young vs. Young, 127 S. W. 898; Stegal vs. Huff, 54 Texas 193; Stoneman vs. Bilby, 96 S. W. 50 (writ refused); Borden vs. City of Houston, 62 S. W. 426; Dunn vs. Taylor, 94 S. W. 347 and others, which hold that a clerk is not authorized to issue and have published a citation against a non-resident defendant on an affidavit by the plaintiff or his attorney that does not allege that he is a non-resident or that his residence is unknown. Specifically, the Texas courts, in this connection directly hold that the affidavit in question and quoted at page 3 of this application stating that the defendant's "whereabouts" was unknown is not the equivalent of stating that his "residence" is unknown and is therefore not a statutory ground authorizing the clerk to issue and have published a citation against the defendant.[1] It was pleaded by the Petitioners that the

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1. Thus in Young vs. Young, 127 S. W. 898, it was said: "The service of a citation was by publication, on defendant in error's affidavit that he 'did not know the whereabouts' of his wife. It is objected that the affidavit was not sufficient to authorize service by publication, and, plaintiff in error not having appeared to defend the suit either in person or by attorney, that the court was without power to render a judgment against her. The contention is sustained * * *"

affidavit in question was insufficient and not a statutory ground authorizing the clerk to issue it and have it published, (R. 11-12). This defect in the proceedings in said County Court case against Jordan could not be disregarded by a court having the judgment therein under review to determine its validity. The trial court held the proceedings a nullity, (R. 30). Therefore the effect to be given to and the construction of the judgment in question based on such fundamental defects, jurisdictional so to speak, present a question of local law and the Honorable Circuit Court of Appeals has therefore decided a question of local law in conflict with applicable decisions of the Texas courts within the meaning of Subdivision B of paragraph 5 of Rule 38 of this Honorable Court.

2. The Honorable Circuit Court of Appeals in reversing the judgment below and in holding, as against a collateral attack, that the citation published against Jordan was authorized and constituted legal notice to him so that the court had jurisdiction to adjudicate against him, wholly disregarded the applicable Texas cases cited under the foregoing first reason and likewise disregarded the provisions of Article 2039, said cases holding that a citation issued by the clerk and published under the facts stated in the quoted affidavit,

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And in Stegall vs. Huff, 54 Texas 193, it was said: "In this case the record of the Justice Court affirmatively shows that the judgment by default against Huff was rendered upon a citation by publication, issued upon a ground not authorized by the statute, and was consequently void, and not voidable only."

does not constitute legal notice to the defendant so that the jurisdiction of the court to adjudicate against him does not attach. Petitioners alleged that the defendant Jordan was not legally served with any citation authorized by law and that the judgment against him was a nullity, (R. 11-12) and the court below sustained this contention, (R. 30). It was a question of local law and it is submitted that the Honorable Circuit Court of Appeals has thus decided a question of local law in conflict with applicable decisions of Texas courts within the meaning of Subdivision B of paragraph 5 of Rule 39 of this Honorable Court.

3. The Honorable Circuit Court of Appeals for the 5th Circuit in so deciding as set forth in the preceding paragraphs 1 and 2 of this petition, held directly contrary to the case of Johnson vs. Hunter, 147 Federal 133, 8th Circuit, opinion by Justice Van Deventer in which it was held that a similar affidavit for a citation by publication stating that the defendant was a non-resident (Johnson a resident of Ohio at the time) but not alleging that he did not reside in the county of the suit at the time thereof and that no one was in possession of the land at the time of the suit, was an insufficient affidavit for the clerk to issue the citation and have it published and also that such citation published did not constitute legal notice to the defendant, for which reason the judgment of the State court of Arkansas selling the defendant's lands to satisfy the judgment was a nullity.

4. The Honorable Circuit Court of Appeals in reversing the judgment below and in holding that the County Court of Scurry County, Texas, was authorized to sell Jordan's lands and that the sale thereof was valid as against a collateral attack, regardless of the defects in the proceedings against Jordan, wholly disregarded Articles 2050 and 2039 of the Texas Statute and the applicable Texas cases of Stewart vs. Anderson, 8 S. W. 295, and American Surety Company vs. S. L. & S. Co., 180 S. W. 101 (both Supreme Court decisions) and others, which directly held that it is essential and jurisdictional in a proceeding to sell attached lands of a defendant served with citation by publication, for the court to first acquire jurisdiction over the defendant in the mode prescribed by law and render a valid judgment against him before the sale is valid.[1] As aforesaid, it was especially pleaded by the Petitioners that the sale in question was void, (R. 11-12). It was contended by the Respondents in their brief in the Circuit Court that citation against Jordan was not a prerequisite for the court to have jurisdiction to sell his lands and divest title out of him. It was a question of local law that was before the trial court in this case. The judgment attacked was by Texas court and in-

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1. Thus in Stewart vs. Anderson, 8 S. W. 295, it was said: "It was necessary that an attachment should have been levied on property within this state, and that the notice required by law to be given by publication should have been given, before the court could acquire jurisdiction to enter a judgment against Humphries, directing property seized to be sold for the payment of the debt due to Harrell; Humphries being a non-resident, and not appearing. This we deem the settled law of the land."

volved lands situate in Texas. Therefore, we present that the Honorable Circuit Court of Appeals has decided a question of law in conflict with applicable decisions of the Texas courts within the meaning of Subdivision B of paragraph 5 of Rule 38 of this Honorable Court.

5. The divorce judgment of 1916: The Honorable Circuit Court of Appeals in reversing the judgment below for Petitioners, and in holding that the divorce judgment by the District Court of Scurry County, Texas, in 1916, had the effect to divest title out of Jordan of his interest in the 200 acres for the reason Article 4638, heretofore quoted on page 11 af this brief, prescribed a Rule of Decision rather than a limitation on the court's jurisdiction to divest title, wholly failed to apply the provisions of said Article and the applicable Texas cases of Tiemann vs. Tiemann, 34 Texas 522; Scott vs. Bank, 133 Texas 1 (123 S. W. 2nd 306); Aucott vs. Aucott, 63 S. W. (2) 755 and Reasoner vs. Reasoner, 59 S. W. (2) 887, and others, which directly hold that in a divorce suit between the husband and the wife that the jurisdiction of the court is limited to a partition or division of the property between them and incidentally to award the use of all or a part of the property in favor of one or the other, but not to divest title.[1] The wife alleged in the suit that the 200

1. Thus in Scott vs. Bank, 133 Texas 1 (123 S. W. 2nd 306) the Supreme Court said: "By the provisions of Article 4638, R. C. S. 1925, the court pronouncing the decree of divorce has jurisdiction, in the divorce action, to decree a division of the estate of the parties in such

acres was the community homestead of herself and husband and that the only other property they owned at the time was a vacant lot in Plains, Texas, but, by reason of his abandonment, title should be divested out of the husband and vested in her, (R. 185). The judgment entered is susceptible of the construction that it divested title and not merely the use of the land, (R. 148). The title to all of the land described in the petition was divested. Petitioners answered and pleaded the invalidity of the judgment as divesting title out of Jordan for want of jurisdiction of the court to do so, (R. 51). The court below held that the divorce judgment was a nullity insofar as it divested Jordan of title and said that the court in a proper case could divide the property or decreed the use of it to the wife, (R. 32). The effect to be given to the judgment in question and the construction thereof is a question of local law and we submit that the Honorable Circuit Court of Appeals has decided a question of local law in conflict with the applicable decisions of the Texas Courts

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a way as the court may deem just and right, having due regard for the rights of each party and their children, if any. This statute does not allow the divorce court to compel either party to the divorce action to divest himself or herself of the title to realty. As we construe it, Article 4638, supra, is mandatory in its provisions."

And in Reasoner vs. Reasoner, 59 S. W. (2) 887, it was said by the court: "Under a proper state of facts the court would have the power to decree the use of the homestead, or even a life estate therein, in appellee, or to order its partition, or its sale and a division of the proceeds. But it had not the power to divest appellant of his title in community realty, to wit, the homestead, in this case. 15 Tex. Jur. p. 584, Sec. 108; Speer's Law of Marital Rights, Sec. 555; Article 4638, R. S. 1925; Tiemann vs. Tiemann, 34 Texas 523; Long vs. Long, 29 Tex. Civ. App. 536, 69 S. W. 428".

within the meaning of Subdivision B of paragraph 5 of Rule 38 of this Honorable Court.

6. The 1928 judgment: The Honorable Circuit Court of Appeals in reversing the judgment below and holding that the judgment of the District Court of Yoakum County, Texas, of June 5, 1928, in favor of Ethel Hall vs. H. C. Jordan was valid as establishing in her a ten year limitation under Article 5510, as against the defendant Jordan, wholly disregarded the applicable Texas cases of Barker vs. Temple Lumber Co., 12 S. W. (2) 175; Baker vs. Fogle, 217 S. W. 141; Temple Lumber Co. vs. Pulliam, 285 S. W. 609; Bergera vs. Meyer, 234 S. W. 544, and others, which directly held that for title of more than 160 acres to be divested out of the owner and vested in the claimant by adverse possession for ten years, that such claimants memorandum of title must be duly registered in deed records of the County where the land is situate for more than 10 years.[1] It was specially pleaded by Jordan that no facts existed or could have existed in 1928, the time of the judgment, to establish title out of Jordan by the 10 year statute of limitation, (R. 52-5). The memorandum of title was the divorce judgment and it was recorded in the deed records of Yoakum County, Texas, in Volume 12, page 203, on March 5, 1920, (R. 148). The provisions of Article 5510, under

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1. The Texas courts construe "duly registered" to mean: "The deed evidencing the claim under which the defendant entered must be recorded (Porter v. Chronister, 58 T. 53; Medlin v. Wilkins, 60 T. 409) in the county where the land is situated (Adams v. Hayden, 60 T. 223; Jones v. Powers, 65 T. 207; Cook v. Dennis, 61 T. 246."

the facts stated, denied jurisdiction of a court to divest title on a statement of facts showing a legal inhibition preventing recovery upon the facts stated. The effect of the judgment and the construction thereof was a question of local law and it is submitted that the Honorable Circuit Court of Appeals decided a question of local law in conflict with the applicable decisions of the Texas Courts within the meaning of Subdivision B of paragraph 5 of Rule 38 of this Honorable Court.

7. The Honorable Circuit Court of Appeals in reversing the judgment below and holding that the judgment in question, under the facts stated, was valid as against a collateral attack, as set forth in the preceding paragraph, wholly disregarded applicable Texas decisions on questions of local law in this: The divorce judgment of 1916 to have effect could only be construed as giving the wife the use of the 200 acres as against Jordan, either for life or for a term. His title thereto could not be divested and the judgment could not be valid as divesting title. The continued use by the wife, by reason of such judgment, could not be, in law, adverse possession as against the owner Jordan. In the petition for a 10 year limitation title she affirmed her right to the use of the land by reason of the divorce judgment and did not repudiate it. She, therefore, had presented no cause of action for the court to exercise jurisdiction to adjudicate against Jordan. Perkins vs. Perkins, 166 S. W. 195; Hardin vs. Hardin,

21 S. W. 1108; Watkins vs. Watkins, 119 S. W. 145 and Hayworth vs. Williams, 116 S. W. 43, all hold that no cause of action under the facts alleged existed for the court to have jurisdiction to divest title out of Jordan by reason of the asserted 10 year Limitation Title.

8. The Honorable Circuit Court of Appeals in reversing the judgment below and in holding that the petition presented a subject matter and controversy for the courts jurisdiction, wholly disregarded applicable Texas decisions and questions of local law in this: The petition and purpose thereof was for the court to decree superior title in Ethel Hall as against Jordan, based on her alleged title acquired by the divorce judgment, and thus for the court to confirm the divorce judgment. It was especially pleaded by Petitioners that the court therein had no jurisdiction, for the reason that no such matter cognizable in law was presented to it, that the court could not have jurisdiction to confirm a void judgment. These applicable Texas cases so hold: Wilkinson vs. Owens, 72 S. W. (2) 330; Hudson vs. Nowell & Son, 88 S. W. (2) 778; Graham vs. E. T. Land & Imp. Co., 50 S. W. 579. Also see the case of Earl vs. McVeigh, 91 U. S. 503.

Counsel for all Respondents are: Frank Stubbeman, Midland, Texas, and Warren Scarborough, Fort Worth, Texas, both of whom have been duly served with copies of this petition and the record herein, as evidenced by their receipt and waiver of notice attached hereto.

WHEREFORE, for the reasons set forth herein, as well as in the supporting brief hereto annexed, Petitioners respectfully pray this Honorable Court to issue its Writ of Certiorari to the Honorable Circuit Court of Appeals for the 5th Circuit, commanding it to forthwith send up a full and complete transcript of the record; that all proceedings be certified to this court, and that this cause be reviewed and the manifest errors of the Circuit Court of Appeals be revised and corrected as provided by law; that upon hearing by this Honorable Court the judgment of the District Court in this cause be affirmed and that the Circuit Court of Appeals for the 5th Circuit be reversed and set aside, and Petitioner's title to the lands in question be confirmed and all clouds cast upon their title by the claim of the Respondents be removed, and that such further proceedings be had herein as may be provided by law and equity.

E. L. Klett

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Of Counsel for Petitioner.

THE STATE OF TEXAS :

COUNTY OF LUBBOCK :

W. W. Campbell, being duly sworn, says that he is of counsel for H. C. Jordan and Ross Walker, Petitioners in the foregoing petition for Certiorari; that he prepared the foregoing Petition for Writ of Certiorari and that the allegations therein are true and that there is just cause for same as he verily believes.

W. W. CAMPBELL,

SUBSCRIBED AND SWORN to before me this the 17 day of January, A. D. 1941.

EUGENIA E. LUNDELL,
Notary Public in and for
Lubbock County, Texas

[Seal]

In the

UNITED STATES SUPREME COURT

OCTOBER TERM 1940

No. .....

H. C. JORDAN & ROSS WALKER, *Petitioners*,

vs.

G. V. FISHER, ET AL, *Respondents*.

May It Please The Court:

We first take up in this supporting brief the questions relating to the 120 acres as set forth at pages 9-10 and 18-22 of the petition for the writ. These questions or propositions were urged in the Circuit Court of Appeals in the brief for Petitioner for said court to affirm the judgment of the court below.

I.

The Head judgment against Jordan, a non-resident, was void, it being procured upon a citation by publication issued upon an affidavit not authorized by law nor meeting the requirements of the Statutes of Texas.

STATEMENT

At the institution of Head's suit against Jordan in the County Court of Scurry County, Texas, on November 14, 1912, his attorney made the affidavit quoted at page 4 of the foregoing petition as the authority for the clerk to issue a citation and have it published against Jordan. Article 2039 of the Texas Statutes is quoted at page 5 of the foregoing petition and we shall not further quote it.

The citation published recited that Jordan's residence was unknown, (R. 223).

The judgment of the County Court (R. 70) adjudged a debt against Jordan of $337.85 and ordered sale of the attached lands of which the 120 acres was a part (R. 71-2). The lands were sold at sheriff's sale to R. H. Looney on November 4, 1913 (R. 79). Looney paid the judgment as the consideration for the deed (Id.) The citation issued and published against Jordan in the suit was based on the aforesaid affidavit of Head's attorney filed in the case on November 14, 1912, and no other citation was published than the one shown in the record, (R. 36). No other title was sought out of Petitioner Jordan by the Respondents except through purchase from Looney by mesne conveyances, (R. 30). No evidence of any other title out of Jordan was offered by Respondents, (R. 30).

(a) The affidavit of Head's attorney that Jordan's "whereabouts" was unknown was not the equivalent that his "residence" was not known or that he was a non-resident.

Young vs. Young, 127 S. W. 898;

Stegal vs. Huff, 54 Texas 193;

Stoneman vs. Bilby, 96 S. W. 50;

Dunn vs. Taylor, 94 S. W. 347;

Borden vs. City of Houston, 62 S. W. 426;

Parker vs. Scobee, 36 S. W. (2) 303.

In Young vs. Young, Supra, the court said:

> "The service of a citation was by publication, on defendant in error's affidavit that he 'did not know the whereabouts' of his wife. It is objected that the affidavit was not sufficient to authorize service by publication, and, plaintiff in error not having appeared to defend the suit either in person or by attorney, that the court was without power to render a judgment against her. The contention is sustained."

In Stegal vs. Huff, Supra, the court said:

> "In this case the record of the Justice Court affirmatively shows that the judgment by default against Huff was rendered upon a citation by publication, issued upon a ground not authorized by the statute, and was consequently void, and not voidable only."

In Parker vs. Scobee, Supra, the court said:

> "Citation by publication was unknown to the common law. It derives its authority solely from the statutes. Since statutes authorizing citation by publication are in derogation of the common law, they are to be strictly construed, and only those persons who plainly come within the terms of the statutes may be served with process by publication".

In 50 C. J. 498, it is said:

> "Every step required to be taken by the statute is essential to the validity of the service and if any of the steps necessary to secure it are omitted, the court will not obtain jurisdiction over defendant to render judgment; and this is so, although defendant may have had actual notice. Furthermore, the method provided by statute for acquiring jurisdiction by constructive service must not only be strictly followed, but must be followed to the exclusion of any other method not also clearly provided".

25 Tex. Jur., Section 269, sums up the invalidity of the Head judgment, under the facts stated, in this language:

> "(Necessity for Process)—He must be served in one of the ways authorized by the statute. * * * In order to obtain jurisdiction over the defendant, and thereby authorizes the rendition of such a judgment against him, the statutory procedure for issuance and service of process must be strictly followed."

The case of Krumenacker vs. Audis, 38 N. D. 500 (165 N. W. 524) directly holds that an affidavit saying

that the "whereabouts" of a defendant is not known is not synonymous with residence.

Harding vs. Standard Oil Company, 182 Federal 421, holds that "residence" and "citizenship" are not synonymous.

(b) The recitations of due service in the Head judgment against Jordan and the recitations in the citation that his "residence" was unknown, did not confer jurisdiction on the County Court to adjudicate against Jordan and sell his lands to satisfy the judgment.

Stegall vs. Huff, 54 Texas 193;

Galpin vs. Page, 21 L. Ed. 959;

Bank vs. Chicago T. & T. Co., 49 L. Ed. 1051;

Johnson vs. Hunter, 147 Federal 133;

Stewart vs. Anderson, 8 S. W. 295.

"Judicial action without jurisdiction is a nullity".

Cleveland vs. Ward, 285 S. W. 1063.

"The very essence of jurisdiction is the power to adjudicate concerning the subject matter."

Where the record of a judgment shows that jurisdiction of the court to render it never attached, jurisdiction of the court cannot be presumed.

Milner vs. Gatlen, 261 S. W. 1003 (Supreme).

(c) The requirements of Article 2039 for service of citation by publication on the defendant that he

make a sworn statement that the defendant is a non-resident, or that his residence is unknown, etc., are jurisdictional requirements.

Stegall vs. Huff, 54 Texas 193;

Stoneman vs. Bilby, 96 S. W. 50;

Dunn vs. Taylor, 94 S. W. 347;

Johnson vs. Hunter, 147 Federal 133;

Galpin vs. Page, 21 L. Ed. 959.

II.

The attachment of Jordan's lands did not confer jurisdiction on the court to sell the lands; it was required for the plaintiff to also serve him in the mode prescribed by law with a valid citation issued on a statutory ground and obtain judgment against him before the jurisdiction of the court attached to sell the land.

Stewart vs. Anderson, 8 S. W. 295;

American Surety Company vs. S. L. S., 180 S. W. 101 Sup.

In each of the foregoing authorities our Supreme court held that the statutory requirements were jurisdictional and that a sale of the lands was a nullity if the statute was not complied with.

Article 2050 is as follows:

> "In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon an appearance by the defendant, as prescribed in this chapter, except where otherwise expressly provided by law."

In the case of Earl vs. McVeigh, 23 L. Ed. 398 and Johnson vs. Hunter, 147 Fed. 133, it is said:

> "As the object of exacting an affidavit as a prerequisite to notice by publication is to insure actual service of a summons in all cases where that is necessary and to avoid the rendition of decrees and the creation of titles which are void, we think it is plain the statute contemplates that the affidavit shall set forth all, and not part, of what is essential to a lawful service by publication."

We, therefore, think that the Honorable Circuit Court of Appeals has held contrary, not only to Texas decisions, but also contrary to the decision of the Circuit Court of Appeals for the 8th Circuit in the case of Johnson vs. Hunter, 147 Federal 133.

We next discuss the questions presented respecting the 200 acres. Such questions and propositions appear at pages 16 and 22-26 of the foregoing petition.

I.

(1916 divorce judgment void if title divested)

The court had no jurisdiction to divest title out of Jordan in favor of his wife as to the 200 acres in ques-

tion in Cause No. 1921, its jurisdiction specially denied by statute, it appearing from the record and judgment in said cause that it was a divorce suit, that the 200 acres was community property of the parties and their homestead, that Jordan was cited to appear and answer the suit by publication and that he did not appear and answer therein nor in any wise consent to the suit and judgment.

STATEMENT

The Scurry County District Court in the 1916 divorce judgment divested title out of Jordan and vested it in his wife to the 200 acres, (R. 148-50). The judgment also divested title out of Jordan in the vacant town lot in Plains, Texas, (Id.). In the petition for the divorce and for title to the property it was alleged that the 200 acres and the town lot was the only real estate of the parties, "plaintiff and defendant were possessed" of such property, that is that they owned it, (R. 184). Title was prayed to be divested out of the husband because he had abandoned his wife, (Id.).

Article 4638, quoted at page 11 of the annexed petition, protects the title to the property in each of the parties by providing that it shall not be divested. This statute has been the law in Texas for some fifty years. Our Supreme Court and Courts of Civil Appeals have construed the statute in a good many cases and without dissent the statute in question has been construed to be

a limitation on the jurisdiction of a court to divest title out of either of the parties; that the court can divide or partition the property between them as is deemed fair and equitable under the particular facts of the case, and in the division the fact that one of them gets property more valuable than the other is not a question of jurisdiction. This was the view of the trial court when this case was tried, (R. 32).

The article cited is a limitation on the jurisdiction of the court denying to it jurisdiction to divest title out of either of the parties to community property in a divorce suit and is not construed as a mere "Rule of Decision" and, for want of jurisdiction, a decree divesting title is a nullity.

Tiemann vs. Tiemann, 34 Texas 522;

Scott vs. Bank, 133 Texas 1 (123 S. W. 2nd 306);

Reasoner vs. Reasoner, 59 S. W. (2) 887;

Aucott vs. Aucott, 63 S. W. (2) 755.

The Tiemann vs. Tiemann case above cited is on all fours on the facts and the law with the Jordan case in the District Court of Scurry County, Texas. The decree divested the house and lot (homestead) in Seguin, Texas, out of the husband and vested it in the wife; also granted divorce and decreed custody of the child to her. The petition alleged that the lot and land was the homestead of the parties. In disposing of the case on appeal, our Supreme Court said:

"We are of the opinion that this decree cannot be supported by the law, in that it does operate to divest the title of defendant in the house and lot in question".

In reforming the judgment, the court mentioned the fact that the child was given to the custody of the wife so that she was the head of the family and therefore the court proceeded to give her the use of the land for life in this language:

"This virtually considers her the head of the family, and we think the court very properly decreed her the use of the homestead; but it was not in the power of the district court to give her more than a life estate in it, and it must therefore be amended so that the plaintiff shall take under it the sole use and right to occupy the said house and lot in the town of Seguin, for and during the term of her natural life, and the decree of the district court, being thus amended is affirmed."

In the Scott vs. Bank case, Supra, our present Supreme Court construed Article 4638 in this language:

"By the provisions of Article 4638, R. C. S. 1925, the court pronouncing the decree of divorce has jurisdiction, in the divorce action, to decree a division of the estate of the parties in such a way as the court may deem just and right, having due regard for the rights of each party and their children, if any. This statute does not allow the divorce court to compel either party to the divorce action to divest himself or herself of the title to realty. As we construe it, Article 4638, supra, is mandatory in its provisions."

Our Court of Civil Appeals in the Reasoner vs. Reasoner case, Supra, said:

> "Under a proper state of facts the court would have the power to decree the use of the homestead, or even a life estate therein, in appellee, or to order its partition, or its sale and a division of the proceeds. But it had not the power to divest appellant of his title in community realty, to-wit, the homestead, in this case. 15 Tex. Jur. p. 584 Para. 108; Spear's Law of Marital Rights, Para. 555; article 4638, R. S. 1925; Tiemann v. Tiemann, 34 Tex. 523; Long v. Long, 29 Tex. Civ. App. 536, 69 S. W. 428."

The construction and effect to be given Article 4638 is revealed in the foregoing decisions quoted. It is plain that the Article is a limitation on the jurisdiction of the court and does not prescribe a "Rule of Decision". It is the established law in Texas. It being a local law, the decision of the Honorable Circuit Court of Appeals in this case, in reversing the judgment below, is in conflict with and opposed to the decisions of all of the courts in Texas.

By analogy which have application we cite:

Grant vs. Ellis, 50 S. W. (2) 1093, by our present Supreme Court, wherein was presented the construction of the statute which provided that court costs in a tax suit was not taxable against the county. The tax collector had furnished at considerable expense the records as a basis for a lot of tax suits which were filed. Later the Commissioners' Court directed the suits to

be dismissed and the collections of the taxes authorized by an outside agency. The court in dismissing the suit adjudged the costs against the county. On appeal, our Supreme Court held:

> "According to the agreed statement of facts, the appellee had faithfully and efficiently performed the services required of him by the statute and earned the fee allowed by the statute; the defendants in the various tax suits were liable for the taxes claimed and these taxes were secured by valid liens upon the lands of the defendants for which foreclosure was asked in the suits. In this situation, when the county asked that its suits be dismissed, for the purpose of collecting all of the delinquent taxes due the state and county through agencies other than the courts, we do not think the statute should be construed as inhibiting the district court from adjudging, as it did in each of these cases, that the county should pay the fees due appellee. The principles of justice are just as binding upon governments as upon the citizens. The appellee had earned his fees and was entitled to a judgment against the defendants in the tax suits therefor with a foreclosure of the tax liens upon the lands of the defendants against which the taxes were assessed. The dismissal of the suits by the county deprived appellee of his right to collect his fees from the defendants in the various suits, and the county should not be permitted for purposes of its own, however, laudable, to deprive the appellee of this right without becoming liable for his fees.
>
> "We think the above holding is erroneous. The statute above quoted is clear and mandatory in its

terms. It absolutely prohibits any liability on the part of the state or county for the fees here involved. Certainly the commissioners' court has no power to set aside the plain terms of the statute either directly or indirectly."

Smith vs. Paschal, 1 S. W. (2) 1086, a judgment of a Probate Court ordered the administrator to close the estate and deliver the remainder of the assets to the County Clerk for distribution. The judgment was complied with. Later the heirs and devisees of the estate sued the Guardian and his bondsmen for the value of such estate delivered to the clerk. The applicable statute required the administrator to make distribution to the heirs or devisees and if they were not available to pay the funds to the State Treasurer for them. The judgment was collaterally attacked and in disposing of the case the court said:

"The most usual statement of what makes a judgment void (distinguished from voidable) is lack of jurisdiction over the parties, or some of them, or want of jurisdiction over the subject-matter. But, whether really included in the first-named condition or not, there is a third (or supplemental) state of like effect, and that is absence of authority to award the particular relief which the judgment undertakes to grant. Crow v. Van Ness (Tex. Civ. App.) 232 S. W. 539; Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931; Freeman on Judgments, Sec. 116, 33 C. J. 1076. This, we think, has recognition in Houston v. Killough, supra, Clayton v. Hurt, 88 Tex. 598, 32 S. W. 877, Crawford vs. McDonald, 88 Tex. 626, 630, 33 S. W. 325; and it is not contra to anything said or held in the cases cited

> by the Court of Civil Appeals. The latter cases, and others like them which might be cited, had to do with mere irregular use of power and not (as here) with forbidden use of particular authority or use of authority in a method different from that specifically prescribed by the law of the court's creation and being. We have the case of a nullity which appears in the face of the judgment and its roll—noticeable 'by any court and at any time' (Higgins v. Bordages, 88 Tex. 458, 31 S. W. 52, 803, 53 Am. St. Rep. 770; Cotton v. Rhea, 106 Tex. 220, 223, 163 S. W. 2)—and not the case of something void for de hors matter or mere irregularity and, hence, within the protecting doctrine of 'collateral attack' ".

Harris vs. Barngrover, 72 S. W. (2) 971, was a collateral attack on a judgment of a Probate Court ordering lease of the ward's land for a period extending beyond his minority. The court was authorized to lease the land but the statute said that it should be leased only during the minority. The court held the judgment of the court ordering the lease of the land was void for want of jurisdiction, that is it was void insofar as it extended beyond the minority of the minor.

Again we see it is plain that our Texas courts do not treat the statute in question, or any analogous statute, as prescribing a "Rule of Decision" but, on the contrary, directly hold that it is a limitation on the jurisdiction of the court. We grant that there are cases in Texas where title was divested but in each and every such case it appeared, as found by the court rendering

the decision, that the defendant in the case appeared and answered and there was a contest between them, judgment rendered, and there was no appeal, or that he had consented to the judgment that was entered divesting him of title. This was true in the Askew case, 120 S. W. (2) 117, cited by the Circuit Court of Appeals. We discussed it in our original brief in said court on pages 51 and 52.

It is plain that the judgment in question is a nullity as beyond the jurisdiction of the court insofar as it divested title out of Jordan to the 200 acres. However, it is also clear that when such a judgment is under review on collateral attack, the reviewing court may treat the judgment as giving the use of the land to the wife for life, or for a term, and not the title, so that the defendant husband in such cases is still deemed, in law, the owner of his interest in the land. His title is not divested or forfeited by his abandonment of the wife and vice versa.

As further showing the holding of our Texas courts that similar statutes are treated as jurisdictional, we state the recent case of Commander vs. Bryan, 123 S. W. (2) 1008, wherein it was contended that the judgment recitals conferred jurisdiction on the court and also that the subject matter in controversy was one over which the court had general jurisdiction. We quote:

> "That announcement is applicable when the court, after acquiring jurisdiction, acts within the

powers delegated to it by the Constitution and statutes creating it. But if the court transcends those powers, its judgment is void and subject to collateral attack, even if it had general jurisdiction over the subject matter. Cline v. Niblo, 117 Tex. 474, 8 S. W. (2d) 633, 66 A. L. R. 916, and authorities therein cited. In that case, the court sustained a collateral attack on orders of the county court in administration proceedings, directing and approving a sale of homestead to satisfy general creditors of the estate, because of the Constitutional exemption of same to satisfy such debts. The probate records did not show that the county court had determined the issue as to whether or not the property was in fact the homestead of the plaintiffs, as surviving members of the family of the decedent. In the absence of such showing, it was held that such homestead character of the property could be established by proof de hors the record of the administration proceedings, and thus to show the lack of power in the probate court to order it sold for the purpose stated.

"Indeed, in Thompson v. Whitman, 18 Wall, 457, 21 L. Ed. 897, and National Exchange Bank of Tiffin v. Wiley, 195 U. S. 257, 25 S. Ct. 70, 49 L. Ed. 184, both cited with approval in Marin v. Augadahl, 247 U. S. 142, 38 S. Ct. 452, 62 L. Ed. 1038-1043, it was held that a judgment may be attacked collaterally as void for lack of jurisdiction of the subject matter or of the person of the defendant, even when the judgment recites findings of jurisdictional facts, such as service of summons upon the defendant. Which is in keeping with the guaranty of due process of law by both the Federal and State Constitutions (U. S. C. A. Const. Amend. 14; Vernon's Ann. St. Const. art. 1, para. 19);

and also in accord with the general rule that a void judgment is incapable of conferring any rights at any time."

II.

(The 1928 judgment)

Since Article 5510 required ten years adverse and peaceable possession "under some written memorandum of title duly registred" before such could be classed as a title, and since Ethel Hall's petition affirmatively alleged that her memorandum of title was recorded in March, 1920 (the judgment in No. 1821) and the record affirmatively showed that her said suit in No. 207 was filed on November 19, 1927, her said Second Count alleged facts showing affirmatively that she had no cause of action upon the facts stated.

STATEMENT

The divorced wife, Ethel Hall, on November 19, 1927, sued defendant Jordan in trespass to try title and also to establish a ten year limitation title out of him, alleging that his residence was unknown and asked that he be cited by publication. He was so cited and made no appearance or answer and thereafter judgment was rendered divesting title out of Jordan and vesting it in her on June 5, 1928 (R. 146-7; 192).

The Second Count of her petition will only be discussed for the reason the trial court held that the First

Count of the petition presented no subject matter for the court's consideration and the Circuit Court of Appeals in this case merely mentioned and referred to the decree so holding under Article 1977 of the statute, which required a plaintiff in such a suit to state the facts showing how he held title and that it was superior to the alleged title of the defendant. In fact it was conceded that the First Count of the petition presented no subject matter for the court's jurisdiction. The limitation count was based on allegations that her memorandum of title, to-wit the divorce judgment, was duly registered for the statutory time required and she referred to the record of it in the deed records of Yoakum County, Texas, for a more complete statement of her right to the possession of the land, (R. 191). Such record showed the judgment was recorded March 5, 1920, (R. 148).

As aforesaid, Respondents began this suit and alleged that title passed out of Jordan by reason of the suit and judgment, (R. 46-48). Petitioners answered and by cross-action alleged the invalidity of the judgment, as fully stated on pages 10 and 11 of the annexed petition.

No statement of the evidence supporting the judgment of the District Court of Yoakum County in said cause was filed, (R. 188).

The Second Count of the petition was as follows:

> "Plaintiff further represents that she has had peaceable and adverse possession of the above land

and premises continuously since September 19th, 1916, as against said defendant and as against the world, and that same is held under a written memorandum of title which fixes the boundary of her claim and has been duly registered in Book 12, on page 204, of the Deed Records of Yoakum County, Texas. That during all of said time she has been in exclusive possession of said property, cultivating, using, and enjoying same and has had same fenced and enclosed with a good and substantial fence and in a tract of acreage of less than 4000 acres, and she claims the title to said property under the ten year statute of limitation and under Article 5510 of the Revised 1925 Civil Statutes of Texas."

Article 5510 is copied in the footnote at page 15 of the annexed petition.

Under Article 5510 quoted, the Count of the petition presented no cause of action for the courts jurisdiction for the reason the memorandum of title referred to and adopted in the count showed on its face to have been recorded in the Deed Records of Yoakum County, Texas, on March 5, 1920. The Statute itself, as construed by the Texas courts, deny one claiming a limitation title as against the true owner when he has not had his memorandum of title recorded for ten years in the County where the land is situate coupled with peaceable and adverse possession.

Barker vs. Temple Lumber Co., 12 S. W. (2) 175;

Temple Lumber Co. vs. Pulliam, 285 S. W. 609;

Fergara vs. Meyers, 239 S. W. 544;

Baker vs. Fogle, 217 S. W. 141.

It is also held by Texas courts that a petition for a cause of action alleging a statement of facts showing "a legal inhibition preventing recovery upon the facts stated" presents no cause of action to a court for its jurisdiction, and, that a judgment entered on such a petition is a nullity not voidable.

McCamant vs. McCamant, 187 S. W. 1096;

Ritch vs. Jarvis, 64 S. W. (2) 831.

III.

Ethel Hall's Second Count of her petition in No. 207, alleging her title and right of possession by reason of the judgment in No. 1821 and not otherwise, and by reason thereof for the court to establish title in her out of Jordan as a ten year limitation title, and said judgment in No. 1821 being a nullity insofar as it purported to divest title out of Jordan, if it did, merely presents to the court a cause of action based on a void judgment and for the court to confirm such judgment in Cause 1821 as a valid judgment; for which the court had no jurisdiction.

Assuming that the divorce judgment, insofar as it divested title, was a nullity and that the only effect to

be given to the judgment would be to treat it as giving the wife the use of the land for life, or for a term, the petition for limitation of title merely presented a cause of action based on a memorandum of title, to-wit the divorce judgment, which was a nullity, and being such the record thereof could not serve as notice to Jordan, the owner, that the wife was claiming the title to his interest in the 200 acres.

Neal vs. Pickett, 280 S. W. 748.

A void judgment is not any legal notice to anyone, especially the owner of land, of which the judgment purports to divest title.

Furthermore such judgment being a nullity and the purport of the Second Count of the petition being for the District Court of Yoakum County, Texas, to confirm such divorce judgment as valid and as divesting title out of Jordan and vesting it in the wife, conferred no jurisdiction on the court for the reason the court has no jurisdiction over a cause of action to confirm a void judgment.

Wilkerson vs. Owens, 72 S. W. (2) 330;

Hudson vs. Nowell & Son, 8 S. W. (2) 778;

Graham vs. East Texas Land Imp. Co., 50 S. W. 579;

Earl vs. McVeigh, 91 U. S. 503.

IV.

Since Jordan and wife owned the 200 acres in community until their divorce in 1916 and thereafter as tenants in common with the wife in possession thereof, and since the title of each to their undivided one half interest was not adverse to the other, and since her claim of possession under the divorce judgment is not deemed in law an adverse possession, her Second Count in her petition in No. 207 to establish title in her to Jordan's one half interest by adverse possession of such interest for ten years, alleging that the land was community property until 1916 when the court divorced them and decreed her the use and possession of Jordan's interest, did not allege any fact to establish title in her to Jordan's interest to constitute adverse possession for ten years for a court to exercise jurisdiction and adjudicate.

A cause of action for a title to land based on allegations that the plaintiff has peaceable and adverse possession under Article 5510 and especially alleging the right of possession based on a void judgment and on facts that show she and the defendant owned it as cotenants with the use of all of it merely decreed to her for a term of years, presents a case that is the antithesis of adverse possession and is no cause of action for the court to adjudicate. It is uniformly held in Texas that there can be no adverse possession in law in favor of the life tenant against the remainderman, or one co-

tenant against another, without allegations that the co-tenant's title is repudiated and such notice made known to him more than ten years before the suit.

Perkins vs. Perkins, 166 S. W. 915;

Hardin vs. Hardin, 217 S. W. 1108;

Watkins vs. Watkins, 119 S. W. 145;

Hayworth vs. Williams, 116 S. W. 43.

The facts alleged in the Second Count of the petition in connection with the references made therein and adopted by Ethel Hall, established the fact that she and her ex-husband defendant owned the land in community until their divorce and thereafter as co-tenants and that her right to the use of Jordan's interest in the land was decreed her by the divorce judgment.

The fact that no statement of the evidence was filed in the suit in Yoakum County, Texas, of Ethel Hall against Petitioner Jordan in 1928 precludes the court from presuming that facts were alleged and proven to sustain the jurisdiction of the court.

Henry vs. Beauchamp, 39 S. W. (2) 642;

Article 2158.

It is noted that the court below in the trial of this suit between the parties hereto found that no evidence was offered of any use and possession of the 200 acres as against Petitioners from the date of the said judgment in 1928 to the date of the trial in 1939, nor was

there any evidence offered of possession of the 200 acres by the wife from the divorce judgment in 1916 to 1928 when she had the second default judgment against him, (R. 33-34).

V.

It is respectfully prayed that writ of certiorari be granted and that upon a hearing of this cause the judgments of the Circuit Court of Appeals reversing that of the District Court, be reversed and set aside and that the judgments entered, one for the 120 acres and the other for the 200 acres, by the District Court for Petitioners be affirmed, together with such other relief as Petitioners may be entitled to, either at law or in equity.

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W. W. Campbell, one of the counsel preparing the foregoing brief and petition, hereby certifies that the same is made in good faith; that in his opinion there are good grounds for same and that such petition and brief are not interposed for delay.

W. W. CAMPBELL.

In the

UNITED STATES SUPREME COURT

OCTOBER TERM, 1940

H. C. JORDAN AND ROSS WALKER, *Petitioners*

VERSUS

G. V. FISHER, FRANCES AMBROSE LAW AND HUSBAND, HAROLD WARD LAW, AND HONOLULU OIL CORPORATION, *Respondents*

AND

H. C. JORDAN AND ROSS WALKER, *Petitioners*

VERSUS

G. V. FISHER AND HONOLULU OIL CORPORATION, *Respondents*

RECEIPT AND WAIVER

Receipt of a copy of the Petition for Certiorari and supporting Brief and the Record is hereby acknowledged, and further, Notice of the filing and presentation of such Petition and Brief is waived and the Clerk of the Supreme Court of the United States may submit same within twenty days from the date of filing as provided by Paragraph 3, Rule 38 of the Supreme Court of the

United States. Respondents, however, reserve the right to file a brief in opposition within the time permitted by the rules of said Court.

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